PT Mainstream Indonesia & Anor v Seri Modalwan Sdn Bhd

HIGH COURT (SANDAKAN) — SUIT NO SDK-22–59/9 OF 2012
DOUGLAS SIKAYUN JC
21 FEBRUARY 2014

Tort — Negligence — Res ipsa loquitur — Action for loss and damage suffered by reason of loss of use and damage to vessel — Whether defendant negligent — Whether electrical tools or any tools required electrical power used — Whether plaintiffs proved on balance of probabilities fire caused due to negligence of defendants

The plaintiffs had commenced an action against the defendant for loss and damage suffered by reason of loss of use and damage to a vessel whilst under repair at the defendants' shipyard. The plaintiffs pleaded *res ipsa loquitor*. The plaintiffs' arguments were that the defendants were negligent in failing to ensure that the electric cables in which electricity was supplied to the said vessel by the defendant for the purpose of the repair was in good and safe condition; failing to ensure that the electric cables in which the electricity was supplied to the said vessel by the defendant for the purpose of repair was properly maintained; failing to ensure sufficient fire fighting equipment on the defendants' premises where the vessel was up slipped; and failing to ensure that the fire fighting equipment, if any, on the defendants' premises where the vessel was up slipped was operational at that material time. The defendant denied liability and submitted that no electrical tools were used or the use of any tools that required electrical power. It was further submitted that fire occurred at the stern where work was done to the propeller shaft and all works ended at about 5pm whereas fire occurred well after that.

Held, dismissing the claim:

(1) *Res ipsa loquitor* did not apply in this case. The fire officer explained that the electrical arcing was the cause of fire. No evidence was sled or adduced that this electrical arching was caused by an outage, surge of electricity due to the defendants' negligence, faulty electrical cables, and faulty switchboards (see paras 10–11).

(2) Evidence showed that fire started at the engine room. There were evidence led by the defendants' witnesses that there were cooking done in the vessel. The plaintiffs could not rebut this oral testimonies as the ship keepers employed or under the pay of the plaintiffs were not called or not available as witnesses. The plaintiffs could not prove on a balance of probabilities that the fire was caused due to the negligence of the defendants (see paras 12 & 15).

(3) Evidence clearly suggested that the plaintiffs' workers did cook on board the vessel. A burnt electrical appliance was found in the engine room. It could only belonged to the workers since the plaintiffs have no access to the vessel. This adds credence to the defendants argument that the plaintiffs' workers were cooking or boiling water and that subsequently led to the electrical arcing. It could not be caused by the defendants' supply cables because that was connected to the vessels' switchboard located at the stern and that was not the place the fire first started (see paras 22–24).

[Bahasa Malaysia summary

Plaintif-plaintif telah memulakan tindakan terhadap defendan untuk kerugian dan ganti rugi yang dialami atas sebab kerugian penggunaan dan kerosakan kepada kapal semasa di bawah pembaikan di limbungan kapal defendan-defendan. Plaintif-plaintif memplid *res ipsa loquitor*. Hujahan plaintif-plaintif hujahan adalah bahawa defendan-defendan adalah cuai kerana gagal untuk memastikan bahawa kabel elektrik dalam mana elektrik dibekalkan kepada kapal oleh defendan bagi tujuan pembaikan dalam keadaan baik dan selamat; gagal untuk memastikan bahawa kabel elektrik dalam mana elektrik dibekalkan kepada kapal oleh defendan bagi tujuan pembaikan diselenggarakan dalam keadaan baik; gagal untuk memastikan peralatan memadam kebakaran mencukupi di premis defendan-defendan di mana tempat kapal berlabuh; dan gagal untuk memastikan peralatan memadam kebakaran, jika ada, di premis defendan-defendan di mana tempat kapal berlabuh berfungsi pada masa material. Defendan-defendan menafikan liabiliti dan berhujah bahawa tiada peralatan elektrik digunakan atau penggunaan apa-apa peralatan yang memerlukan kuasa elektrik. Ia selanjutnya dihujahkan bahawa kebakaran berlaku di buritan di mana kerja dijalankan kepada aci kipas dan kesemua kerja selesai pada lebih kurang pukul 5 petang sedangkan kebakaran berlaku sebaik sejurus itu.

Diputuskan, menolak tuntutan:

(1) *Res ipsa loquitor* tidak diguna pakai dalam kes ini. Pegawai kebakaran menjelaskan bahawa pengarkaan adalah punca kebakaran. Tiada keterangan dikemukakan bahawa pengarkaan elektrik disebabkan oleh keluaran, lonjakan elektrik akibat kecuaian defendan-defendan, kabel elektrik yang rosak, dan papan suis rosak (lihat perenggan 10–11).

(2) Keterangan menunjukkan bahawa kebakaran bermula di bilik enjin. Terdapat keterangan yang dikemukakan oleh saksi-saksi defendan-defendan bahawa terdapat perbuatan memasak di dalam kapal. Plaintif-plaintif tidak dapat mematahkan keterangan-keterangan lisan ini kerana penjaga kapal yang diambil bekerja atau bekerja dengan plaintif-plaintif tidak dipanggil atau tidak dapat untuk hadir sebagai saksi-saksi. Plaintif-plaintif tidak dapat membuktikan atas imbangan

kebarangkalian bahawa kebakaran disebabkan kecuaian defendan-defendan (lihat perenggan 12 & 15).

(3) Keterangan jelas mencadangkan bahawa pekerja-pekerja plaintif memang memasak atas kapal. Peralatan eletrik yang terbakar didapati di bilik enjin. Ia hanya boleh dimiliki oleh pekerja-pekerja kerana plaintif-plaintif tidak mempunyai akses kepada kapal. Ini menambahkan kebenaran kepada penghujahan defendan-defendan bahawa pekerja-pekerja plaintif-plaintif memasak atau memasak air dan ini kemudiannnya membawa kepada pengarkaan elektrik. Ia tidak boleh disebabkan oleh kabel pembekalan defendan-defendan kerana ia dihubungkan kepada papan suis kapal yang terletak di buritan dan ia bukan kawasan kebakaran bermula (lihat perenggan 22–24).]

Notes

For cases on res ipsa loquitor, see 12(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1565–1600.

Cases referred to

Donoghue (Cor McAlister) v Stevenson [1932] AC 562, HL (refd)

Legislation referred to

Evidence Act 1950 s 114 (g)
Occupational Safety and Health Act 1994

Francis Wong (William Liaw, Chan & Co) for the plaintiffs.
Edwin Tsen (Tan Pang Tsen & Co) for the defendant.

Douglas Sikayun JC:

[1] The plaintiffs had commenced an action against defendant for loss and damage suffered by reason of loss of use and damage to the vessel MV Marina Batam whilst under repair at the defendants' shipyard.

[2] The plaintiffs plead *res ipsa loquitor*.

[3] They further say that due to the defendants' negligence the plaintiffs suffered loss and damage.

[4] Particulars of the negligence as pleaded are as follows:

(a) Failure to ensure that the electric cables in which electricity was supplied to the said vessel by the defendant for the purpose of the repair was in good and safe condition.

A (b) Failure to ensure that the electric cables in which the electricity was supplied to the said vessel by the defendant for the purpose of repair was properly maintain.

(c) Failure to ensure sufficient fire fighting equipment on the defendants' premises where the vessel was up slipped.

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(d) Failure to ensure the fire fighting equipment if any on the defendants' premises where the vessel was up slipped was operational at that material time.

C

[5] That was the plaintiffs' pleaded case.

[6] The defendant on the other hand denied liability and say that no electrical tools were used or the use of any tools that required electrical power.

D

[7] Fire occurred at the stern where work was done to the propeller shaft and all works ended at about 5pm whereas fire occurred well after that.

E **[8]** Having produced pictures sharking of the electrical power cables that supplied electricity from the defendants power source to the vessels' switchboard, it was never in evidence nor put to the investigating fire officer PW1 that that was the cause of the electrical fire or that the said cables was faulty.

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[9] I do not think that the defendant had proven on a balance of probabilities that cl 10 (i) and (ii). In so far as para 10 (iii) and (iv) it is equally clear to me that failure to ensure sufficient fire fighting equipment on the defendants' premises do not caused the fire.

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[10] I do not think that *res ipsa loquitor* applies in this case as the cause of fire as reported by the Jabatan Bomba dan Penyelamat Malaysia as 'SN7 Electrik'.

[11] The fire officer explained that the electrical arcing was the cause of fired. H No evidence was sled or adduced that this electrical arching was caused by an outage, surge of electricity due to the defendants' negligence, faulty electrical cables, and faulty switchboards.

I **[12]** Evidence from PW is that fire started at the engine room. There were evidence led by the defendants' witnesses that there were cooking done in the vessel. The plaintiffs' couldn't rebut this oral testimonies as the ship keepers employed or under the pay of the plaintiffs were not called or not available as witnesses.

[13] I accept the evidence of the defendants' witnesses, the watchman who first raised the alarm, that he saw the ship keepers on the top of the vessel, that the doors of the vessels were locked and that they were unable to enter the vessel to contain the fire.

[14] There were no third parties around the vessel at that material time.

[15] I am of the opinion that the plaintiffs could not prove on a balance of probabilities that the fire was caused due to the negligence of the defendants. Neither can I agree on the issue of *res ipsa loquitor*.

[16] The next issue to address is whether the failure to comply with the International Labour Organisation Guidelines for Safety and Health in Ship Building and Ship Repairing for the purpose of complying with safety and health requirements at the defendant's dockyard and premises makes the defendants liable for the damages caused by the fire even when the defendant has not been proven to be negligent.

[17] The defendants however argued that this issue is irrelevant and not pleaded by the plaintiffs and that parties are bound by their pleadings. I agree.

[18] In their reply to the defence at cl 4(ix) the plaintiffs alleged that the defendants was in breach of its statutory duty under the Occupational Safety and Health Act 1994 in supplying the electricity to the said vessel for the use of the plaintiffs' workers and for allowing the workers to cook on board the vessel or in the premises of the defendants when the said vessel was up slipped for repair.

[19] But the violation of certain sections of that 1994 Act does not in any way make the defendant liable for the damages caused by the fire when i have already ruled that negligence on the part of the defendant had not been proven even on a balance of probability. There must be a nexus between the alleged negligence and liability. Without proof of negligence there cannot be any liability.

[20] I have re-read the authorities cited by learned counsel Mr Francis Wong. I am unable to bring myself to agree with his submissions. This, if accepted, definitely extends principle in *Donoghue (Cor McAlister) v Stevenson* [1932] AC 562 much further. I think this is best left to the Legislature.

[21] The same goes to the International Labour Organisation Guidelines. Failure to comply with the guidelines and violation or non compliance of the 1994 Act may attract sanctions or penalties but I do not think they will make the defendant liable for the damages that he was not responsible for.

[22] Paragraph 4(ix) reply to defence clearly suggest that the plaintiffs workers did cook on board the vessel (see the pleadings 'for allowing the workers to cook on board'). A burnt electrical appliance was found in the engine room. It could only belonged to the workers since the plaintiffs have no access to the vessel.

[23] This adds credence to the defendants argument that the plaintiffs' workers were cooking or boiling water and that subsequent led to the electrical arcing.

[24] It cannot be caused by the defendants' supply cables because that was connected to the vessels' switchboard located at the stern and that was not the place the fire first started.

[25] I have heard and seen the defendants' witnesses in particular those that were present during the night of the fire. I find them to be truthful. I cannot say the same for the plaintiffs as none of the ship keepers came to give evidence hence the defendants' witness were unrebutted. No reasons were advanced as to why the ship keepers were not available as the plaintiffs' witnesses. I consider them to be necessary to the unfolding of the narration of the plaintiffs' case, after all they were midst of things ie the fire that is. In the circumstances, I must draw adverse inference against the plaintiffs under s 114 (g) of the Evidence Act, in that if they were called they will give evidence favourable to the defendants.

[26] In the circumstances, I must rule that the plaintiffs have not proven their case on the balance of probabilities.

[27] In view of my ruling above, I do not propose to deal with the issue of the second plaintiff and remoteness of damage.

[28] I dismiss the plaintiffs' claim with getting up cost of RM50,000. Other costs to be taxed if not agreed.

Claim dismissed.

Reported by Afiq Mohamad Noor